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IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

NPC SERVICES INC., EXXON MOBIL CORPORATION, UNITED STATES STEEL CORPORATION, DSM COPOLYMER, INC., SHELL CHEMICAL LP, CROMPTON MANUFACTURING COMPANY, INC., THE DOW CHEMICAL COMPANY, ETHYL CORPORATION, CELANESE AMERICAS CORPORATION, HONEYWELL INTERNATIONAL INC., ROBERT G. BOLGER, J.W. STREET, AND W.L. RAINEY,

Petitioners,

v.

MSOF CORPORATION AND J. PAUL LEBLANC,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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I. The All Writs Act Issue Warrants A Hold for *Syngenta*.

The first question presented by the petition—whether, and under what circumstances, the All Writs Act authorizes removal of state-law claims that threaten the integrity of an existing federal judgment—is the very issue presented in the *Syngenta* case argued in this Court on October 15, 2002. *See Syngenta Crop Protection, Inc. v. Henson*, No. 01-757, *cert. granted*, 122 S. Ct. 1062 (Feb. 19, 2002). Accordingly, at the very least, the Court should hold this petition pending the resolution of *Syngenta*.

Respondents do not deny that this issue is currently pending before the Court in *Syngenta*. Rather, they simply argue the merits of their position that the All Writs Act provides no basis for federal removal jurisdiction. Opp. 3-6. Those arguments, however, are misplaced. This Court's forthcoming decision in *Syngenta* will resolve the point one way or the other. The only issue raised by the first question presented is whether to hold this petition pending the resolution of *Syngenta*.

Respondents suggest that such a hold is unwarranted because "[e]ven under the expansive interpretation of the All Writs Act approved in the Second, Seventh [*sic*] and Eighth Circuits, removal of the MSOF action under the All Writs Act is improper in this case because the MSOF action does not pose a threat to the integrity of the Consent Decree." Opp. 8. That suggestion is baseless. As explained in the petition, the Second, Sixth, and Eighth Circuits have held that the All Writs Act allows defendants "to protect federal consent judgments by removing potentially inconsistent state law claims to federal court." *Sable v. General Motors Corp.*, 90 F.3d 171, 175 (6th Cir. 1996) (citing *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 864 (2d Cir. 1988)); *see also Xiong v. Minnesota*, 195 F.3d 424, 427 (8th Cir. 1999); *Bylinski v. City of Allen Park*, 169 F.3d 1001, 1002-03 (6th Cir. 1999); *NAACP v. Metropolitan Council*, 144 F.3d 1168, 1170-71 (8th Cir. 1998); *United States v. City of New York*, 972 F.2d 464, 469 (2d Cir. 1992).

Respondents attempt to distinguish these cases by simply denying the possibility of any conflict between the remedy they are seeking in state court and the remedial scheme established by the federal consent decree. *See* Opp. 7-8. According to respondents, "MSOF desires the attainment of the explicit objective of the Consent Decree—the protection of the public, *including MSOF and its property*, from the release of the toxic substances from the PPI waste sites . . . ." *Id.* (emphasis added). Under this simplistic view, there can be no conflict between state and federal remedies as long as they both share the common objective of protecting nearby property owners from environmental contamination.

That position has no basis in law or logic. To the contrary, this Court has emphasized that a conflict can arise where, as here, state law is invoked as a source of different and/or additional remedies than those provided by federal law. *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 379-80 (2000); *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992). Respondents' assertion that "the award of monetary damages to MSOF would not impact or effect [*sic*] the implementation of the remediation plan called for in the Consent Decree," Opp. 8, is preposterous: respondents are seeking monetary damages (both compensatory and punitive) under state law based on contamination alleged to have occurred *under the federal consent decree* over the past two decades. *See* Pet. App. 29a-30a (charging petitioners with having allowed toxic substances to escape from the site "[o]n numerous occasions" and "on a continuing basis"). It goes without saying that the imposition of monetary damages for conduct carried out pursuant to a federal consent decree would conflict with the remedial scheme established by that decree. *See, e.g., Geier v. American Honda*

Motor Co., 529 U.S. 861, 881-82 (2000); *International Paper Co. v. Ouellette*, 479 U.S. 481, 494-95 (1987).*

In any event, this petition is not the proper vehicle for definitively resolving the dispute over the relationship between respondents' state claims and the federal consent decree. If this Court were to uphold removal under the All Writs Act in *Syngenta*, it would be entirely appropriate to grant this petition, vacate the judgment, and remand to the Fifth Circuit for reconsideration in light of that decision. There is simply no basis for this Court to tip its hand in *Syngenta* by disposing of this petition prior to resolution of that case.

II. The CERCLA Issue Is Independently Certworthy Regardless Of The Resolution of the *Syngenta* Issue.

Wholly apart from the *Syngenta* issue involving federal jurisdiction under the All Writs Act, this petition presents a certworthy issue involving federal jurisdiction under CERCLA. As noted in the petition, the Fifth Circuit's holding that respondents' ostensible state-law claims do not present a federal question conflicts directly with a line of cases from the Ninth Circuit holding that ostensible state-law claims that challenge the adequacy of a CERCLA cleanup thereby "arise under" CERCLA, and present a federal question. *See* Pet. 10-11 (citing *Arco Envtl. Remediation, L.L.C. v. Department of*

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* Respondents further suggest that their state action could not conflict with the federal consent decree because (1) "MSOF's property is not within the PPI waste sites defined in the Consent Decree," and (2) "MSOF was not party to the Consent Decree." Opp. 9. Both suggestions miss the mark. The fact that respondents' property is not within the actual waste sites is wholly irrelevant because (as respondents themselves concede) an "explicit objective of the Consent Decree" was "the protection of the public, *including MSOF and its property*, from the release of the toxic substances *from* the PPI waste sites . . . ." *Id.* at 7-8 (emphasis added). And the fact that respondents are not parties to the consent decree is similarly irrelevant: whether the remedy respondents are seeking in state court conflicts with the remedial scheme established by the federal consent decree has nothing to do with the identity of the parties to that decree.

Health & Envtl. Quality of Montana, 213 F.3d 1108, 1115 (9th Cir. 2000); *Fort Ord Toxics Project, Inc. v. California EPA*, 189 F.3d 828, 832 (9th Cir. 1999); *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 239 (9th Cir. 1995)).

Respondents seek to distinguish this line of cases by asserting that their state-court action "is not a challenge to a CERCLA cleanup." Opp. 17. That assertion does not pass the straight-face test. As noted above, respondents are seeking monetary damages (compensatory and punitive) in state court for contamination alleged to have occurred *under the federal consent decree* over the past two decades. Indeed, petitioner NPC Services, Inc., is the very entity established pursuant to the consent decree to undertake the CERCLA cleanup. Accordingly, respondents' claims are logically premised on the inadequacy of the federal CERCLA cleanup: respondents *would have no such claims* if petitioners' remedial efforts under CERCLA were adequate.

Contrary to respondents' assertion, thus, their claims manifestly *do* challenge a CERCLA cleanup under the standards applied by the Ninth Circuit. The Ninth Circuit has described such a challenge in the broadest of terms, holding that "[a]n action constitutes a challenge to a CERCLA cleanup 'if it is related to the goals of the cleanup.'" *Arco*, 213 F.3d at 1115 (quoting *Razore*, 66 F.3d at 239). As noted above, respondents are invoking state law in an effort to impose environmental standards more stringent than those imposed under CERCLA. Their claims therefore cannot remotely be characterized as "'unrelated to disputes over environmental standards.'" *Arco*, 213 F.3d at 1115 (quoting *Fort Ord*, 189 F.3d at 831); *cf. Ouellette*, 479 U.S. at 494-95 (state nuisance action challenging discharge of pollutants conflicts with federal environmental law establishing a permit system for such discharge). Because the Ninth Circuit has "found actions to challenge CERCLA cleanups where the plaintiff seeks to dictate specific remedial actions, to postpone the cleanup, to impose additional reporting requirements on the cleanup, or to

terminate the [Remedial Investigation/Feasibility Study] and alter the method and order of cleanup," *Arco*, 213 F.3d at 1115 (citations omitted), the ostensible state-law claims at issue here necessarily challenge the adequacy of a CERCLA cleanup under the Ninth Circuit standard, and thus would give rise to federal-question jurisdiction in the Ninth Circuit. By holding that respondents' claims did not present a federal question under CERCLA, thus, the Fifth Circuit created a circuit conflict on this important issue of federal jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari or, in the alternative, hold this case pending disposition of *Syngenta*.

Respectfully submitted,

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